

SUPREME COURT OF GEORGIA

ATLANTA, June 2, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

NATHAN BROWN V. WALTER ZANT, SUPT.

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams,

Clerk.

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

NATHAN BROWN,

PETITIONER

VS.

WALTER D. ZANT,
SUPERINTENDENT,
GEORGIA DIAGNOSTIC
AND CLASSIFICATION
CENTER,

RESPONDENT

HABEAS CORPUS
FILE NO. 5407

ORDER

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Taliaferro County. Petitioner was convicted of murder, armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and two counts of kidnapping with bodily injury. He was sentenced to death for murder, armed robbery, and the counts of kidnapping; to ten years' imprisonment for aggravated assault; and to five years for the firearms possession. The Supreme Court affirmed the convictions and sentence for murder and one count of kidnapping; affirmed the convictions but vacated the death sentences for armed robbery and the other count of kidnapping and remanded them to the trial court for resentencing to

life imprisonment for the count of kidnapping and as provided by law for armed robbery; and reversed the convictions for firearms possession and aggravated assault because they were lesser included offenses. Brown v. State, 247 Ga. 298 (1981). Certiorari was denied by the Supreme Court of the United States.

The petition, as amended, contains 37 numbered paragraphs, of which 25 allege substantive claims for relief (11-34; 37). Evidence and argument have been presented on only 12 points, however, and the Court will address only these claims for relief. All unsupported allegations will be deemed abandoned and without merit.

The record in this case consists of the affidavit of Petitioner and the record and transcript of his trial in the Taliaferro Superior Court.

1.

In his first claim for relief, Petitioner claims he was denied his right to effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments and the Georgia Constitution.

FINDINGS OF FACT

Petitioner was represented at trial and on appeal by Walton Hardin. Mr. Hardin was appointed to represent Petitioner on May 17, 1977, approximately nine months after Petitioner's arrest on August 26, 1977 (R. 50-51).

The record contains no pre-trial motions

filed by Counsel, but Counsel made numerous motions during trial. (T. 130; 366; 397; 460; 472; 483; 488; 490). Counsel also challenged the composition of the traverse jury during voir dire, but the motion was overruled. (T. 104-106). At trial, Counsel made no opening statement but reserved the right to make one (T. 125); cross-examined State witnesses (T. 150; 155; 183; 207; 215; 229; 234; 238; 265; 286; 290; 307; 309; 321; 337); gave closing argument during the guilt/innocence phase (T. 404-416); presented two witnesses in the sentencing phase, including Petitioner (T. 448; 463); and gave closing argument in the sentencing phase (T. 491-494).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Counsel here easily meets the test. He prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and the lack of material with which to work. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has claimed Counsel was ineffective for failing to investigate the case properly and

Interview witnesses. Yet, Petitioner has presented no shred of evidence to show a defense was available, which Counsel did not pursue or that witnesses were available but not pursued. The Court cannot find Counsel ineffective for this reason.

Petitioner has also complained of the failure of Counsel to file pre-trial motions, yet has made no showing that any motions, if filed, would have been successful. Counsel did challenge the array of traverse jurors, but the motion was overruled. Petitioner has made no showing that the challenge could have been successful.

Petitioner has also alleged that Counsel was ineffective for failing to challenge the admissibility of Petitioner's confession. A Jackson-Denno hearing was held with Petitioner among the witnesses. (T. 312-339). The trial court ruled the statement was freely and voluntarily given and, therefore, admissible. Id. Petitioner has not shown that the trial court's determination of admissibility was clearly erroneous. Hurt v. State, 239 Ga. 664(2)(1977).

Finally, Petitioner's remaining allegations, such as the proper questions Counsel should have asked on voir dire, relate to strategic and tactical decisions which are the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1975). Effectiveness is not measured by how another lawyer might have handled

the case. Estes v. Perkins, 228 Ga. 268 (1968).

Accordingly, this claim for relief is found to be without merit.

- 2 -

In his second claim for relief, Petitioner contends that the jury instructions on intent in the guilt/innocence phase were impermissibly burden-shifting under Sandstrom.

FINDINGS OF FACT

The Court has examined the jury instructions given in the guilt/innocence phase. (T. 418-443). The trial court instructed the jury as to the State's burden to prove every element of each offense, on the presumption of innocence, and on reasonable doubt. Id.

As to intent, the trial court charged:

"I give you the following definition: a crime is a violation of a statute of this State in which there shall be a union or joint operation of act and intention. I charge you that the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted. I charge you that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but the presumption may be rebutted. I charge you that a person will not be presumed to act with criminal intention, but the trier of facts may find such intention upon consideration of the words, conduct, demeanor,

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

motive, and all other
circumstances connected
with the act for which
the accused is prosecuted."

(T. 426).

The trial court also defined the offenses
with which Petitioner was charged, including malice
murder. As the final portion of the instruction
on murder, the trial court charged:

"I charge you, members
of the jury, that the
law presumes that a
person intends to
accomplish the natural
and probable consequences
of his acts or acts if
that person uses a
deadly weapon or
instrumentality in the
manner in which such
weapon or instrumentality
is ordinarily employed
to produce death, and
thereby causes the
death of a human being.
The law presumes the
intent to kill. This
presumption may be
rebutted. I further
charge you that a person
will not be presumed to
act with criminal intention,
but the triors of the facts
may find such intention
upon consideration of
the words, conduct, demeanor,
and all other circumstances
connected with the act for
which the accused has been
prosecuted. The burden is
upon the State to prove
the act alleged to be
criminal is, in fact, a
criminal act beyond a
reasonable doubt."

(T. 438-439).

CONCLUSIONS OF LAW

The first cited portion of the charge on intent is
virtually identical to the charge in Skirne v. State,

244 Ga. 520 (1979), which was found not to violate Sandstrom, supra. The Court finds the presumptions created were permissible presumptions which the jury was free to apply or reject. Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); Skrine v. State, supra.

As to the second cited portion of the charge, Petitioner relies on the recent decision of Mason v. Balkcom, No. 80-7344 (former 5th Cir., March 1, 1982), to assert that the instruction on intent violated Sandstrom, supra.

In Mason, the trial court's instruction creating a presumption of intent to kill was found to relieve the state of its burden of proving an essential element of murder. Mason had raised the issue of self-defense. The appellate court noted that in asserting self-defense, Mason was required to admit the facts that activated the presumption. The Court found the instruction clearly fell within the proscription of Sandstrom and was unconstitutional.

Mason is readily distinguished from the case at hand. The jury in Mason, as in Sandstrom, was not told the presumption could be rebutted. Here, the jury was clearly told that the presumption could be rebutted and again reminded that the State had the burden of proving the criminality of the alleged act. Thus, there was no danger of the jury misinterpreting the instruction.

Additionally, the Supreme Court has concluded that this charge did not violate Sandstrom. Cf. Hosch v. State, 246 Ga. 417, 419-420 (1980). Though the Court found that the charge was not error, the Court did not approve its continued use. Id. However, the trial court in Petitioner's case did not have the benefit of the Hosch decision as Petitioner's trial began on May 29, 1979. (R. 51). The

Court concludes that the charge on intent was not error.

In reviewing the charge as a whole, the Court finds the jury was properly instructed in the guilt/innocence phase.

Accordingly, this claim for relief is found to be without merit.

3.

In his third claim for relief, Petitioner claims that the Ga. Code Ann. §27-2534.1(b)(7) aggravating circumstance was unconstitutionally applied in this case.

FINDINGS OF FACT

The Supreme Court has already concluded that the evidence supports the finding of the (b)(7) aggravating circumstance by a trier of fact beyond a reasonable doubt. Brown v. State, supra, at 303(10).

CONCLUSIONS OF LAW

Findings of the appellate courts are binding upon this Court for the purposes of review. Tron v. Ault, 231 Ga. 750 (1974).

Accordingly, this allegation is found to be without merit.

4.

The Supreme Court has already concluded no actual conflict of interest had been shown where Counsel had represented Petitioner and one of his co-indictees. Brown v. State, supra, at 299(2).

Petitioner has made no showing to the contrary.

Accordingly, this claim for relief is found to be without merit.

5.

In his fifth allegation, Petitioner claims that his Sixth Amendment right to a speedy trial was violated by the length of time he was incarcerated awaiting trial.

FINDINGS OF FACT

The crime occurred in Taliaferro County on July 27, 1976. (R. 51). Petitioner was arrested in Richmond County on August 26, 1976. Id. Petitioner was one of three co-indictees to be tried for the crime, with his trial beginning on May 29, 1979. Id. Cf. Ruffin v. State, 243 Ga. 95 (1979); High v. State, 247 Ga. 289 (1981).

CONCLUSIONS OF LAW

When a deprivation of the right to a speedy trial has been alleged, four factors are to be weighed in a balancing test: length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); Haisman v. State, 242 Ga. 896, 898 (1979).

Here, approximately 2 years and 9 months elapsed between the time of Petitioner's arrest and his trial. Since this 33-month delay could have prejudiced Petitioner,

the Court must evaluate the other 3 factors of the Barker v. Wingo test.

Petitioner has presented no evidence as to the reason for the delay. Absent proof, the Court cannot assume the reason was a deliberate ploy by the prosecution to obtain a tactical advantage at trial.

Secondly, Petitioner never asserted his right to a speedy trial through any type of motion. Petitioner would have the Court attribute the reason for failure to assert this right to ineffective assistance of counsel. However, absent any proof, the Court cannot make such an assumption when the reason for not asserting the right could just as easily have been a tactical decision by defense counsel.

Finally, Petitioner has claimed prejudice from the delay but has made no showing of such.

Thus, the length of delay, standing alone, is not sufficient to convince this Court that Petitioner was denied his right to a speedy trial.

Accordingly, this claim for relief is found to be without merit.

6.

In his sixth claim for relief, Petitioner alleges that the grand and traverse juries were unconstitutionally composed which violated his Sixth and Fourteenth Amendment rights.

FINDINGS OF FACT

Counsel challenged the array of traverse jurors during voir dire, but the motion was overruled. (T. 104-106).

CONCLUSIONS OF LAW

The right to object to the composition of a grand or traverse jury in a habeas corpus proceeding under Georgia law will be deemed waived unless Petitioner shows in the petition and satisfies the Court that cause exists for his being allowed to pursue the objection after the conviction and sentence have otherwise become final. Ga. Code Ann. §50-127(1). Under federal law, an additional showing of actual prejudice is required. Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976).

The "cause" asserted by Petitioner in this case is that his trial counsel rendered ineffective assistance by failing to file a timely challenge to the grand jury composition and failing to present evidence in an effective manner upon his challenge to the traverse jury composition.

Failure to challenge arrays of grand and traverse juries is not a ground of ineffective assistance or "cause" within the meaning of Ga. Code Ann. §50-127(1). Goodwin v. Hopper, 243 Ga. 193 (1979). Accordingly, Petitioner's challenge to the grand jury composition is deemed waived.

As to the traverse jury, Petitioner has presented no evidence to show that such a challenge could have been successful. Thus, the Court cannot find Counsel ineffective for not prevailing on his challenge.

Accordingly, this allegation is found to be without merit.

7.

The Supreme Court has already concluded that the exclusion of jurors under Witherspoon² does not result in a "hanging jury." Brown v. State, supra, at 300.

8.

Petitioner's argument that death-scrupled jurors constitute a representative, cross-section of the community so that their exclusion is unconstitutional was rejected in Smith v. Balkcom, 660 F.2d 573 (1981).

9.

Petitioner's "prosecution-prone" argument was rejected in Smith v. Balkcom, supra.

10.

The Supreme Court has already reviewed the voir dire transcript and concluded there was no violation of Witherspoon in the exclusion of jurors.

² Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Brown v. State, supra, at 300(3).

11.

In his eleventh claim for relief, Petitioner alleges that his death sentence is unconstitutional because the death penalty is being imposed arbitrarily and capriciously in the State of Georgia.

Petitioner has presented no evidence to support his claim.

Accordingly, the Court finds this allegation to be without merit.

12.

In his twelfth claim for relief, Petitioner contends the jury instructions in the sentencing phase were deficient as to mitigating circumstances.

FINDINGS OF FACT

The Court has examined the charge to the jury in the sentencing phase. (T. 495-498).

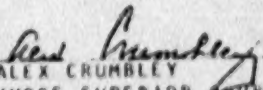
CONCLUSIONS OF LAW

The trial court clearly instructed the jury as to mitigating circumstances and the option to recommend against death. The charge comports with Spivey v. Zant, 661 F.2d 464 (1981).

Accordingly, this allegation is found to be without merit.

WHEREFORE, all allegations having been found to
be without merit or abandoned, the petition is hereby
denied.

SO ORDERED, this 16 day of April, 1982.


ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT